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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1092

RONALD LEE CASSITY - - - - Petitioner

versus

THE UNITED STATES OF AMERICA - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RONALD LEE CASSITY - - - - *Petitioner*

v.

THE UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Ronald Lee Cassity, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy of the opinion is printed in Appendix A hereof, p. . There was no opinion in the District Court.

The judgment and opinion of the Court of Appeals, sought to be reviewed, was dated and entered on December 28, 1972.

Petitioner's Petition for Rehearing (filed on January 9, 1973).

JURISDICTION

It is believed that 28 U.S.C., §1254 (1), and Supreme Court Rule 19, Paragraph 1(b), confer jurisdiction upon the Supreme Court to review the judgment in this case by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1.) Whether or not 18 U.S.C. §922(a)(6) which makes it unlawful "for any person in connection with the Acquisition . . . of any firearm . . . to make any false . . . statement . . ." can be applied as to purely intrastate transactions in view of *United States* v. *Bass,* 404 U. S. 336, and the 10th Amendment of the United States Constitution.

2.) Whether or not the admission of evidence obtained as a result of an arrest which had been held invalid in a separate proceeding in another state after the trial concerned herein, and was objected to at the trial herein, was an abridgement of the Defendant's rights under the Fourth Amendment of the United States Constitution.

3.) Whether the Court of Appeals has denied the Defendant's Fifth Amendment right to confront the evidence against him by affirming the admitting of the testimony of an Alcohol, Tobacco and Firearms agent to prove a firearms dealer's license rather than requiring the United States to produce the license.

STATUTE INVOLVED

The Statute involved is:

18 U.S.C., Sec. 922(a)(6), which reads:

> "Sec. 922(a)(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

STATEMENT OF THE CASE

The Petitioner was indicted and tried in The United States District Court for the Western District of Kentucky and found guilty by a jury on March 28, 1972 of uttering a false statement in acquiring a firearm.

The firearm concerned in this action and the information on which the indictment was based had been obtained by the government while the Defendant was in custody for possessing such weapon in the Southern District of Indiana. On May 23, 1972 the United States District Court of the Southern District of Indiana ruled to suppress all evidence surrounding Defendant's arrest since the Defendant had been illegally arrested.

The proof showed that Defendant's attorney raised the question of no interstate nexus being proved but was overruled by the Trial Court Judge.

In proving its case in the trial court the United States proved an essential part of their case by having an Alcohol, Tobacco and Firearms dealer testify that the dealer was licensed rather than producing the license itself so that it could be cross-examined (TP, p. 67, line 12).

Also, the new evidence of the Indiana Judgment was presented to the District Court on a Motion for New Trial but the motion was overruled.

The questions involved in the construction of the federal statute, the impropriety of the testimony in lieu of the license and the question of the evidence being tainted were all properly raised by motions and objections to testimony in the trial court, and duly presented upon Appeal.

REASONS FOR GRANTING THE WRIT

1.) The opinion of the Court of Appeals in construing the congressional intent behind 18 U.S.C. §922(a)(6) and allowing it to be applied to a purely intrastate transaction was clearly contrary to the interpretation given a similar statute in *U. S.* v. *Bass,* 404 U. S. 336, where the Court required an interstate nexus to be proven to give the United States Government jurisdiction.

In *Bass* the Court stated when dealing with another part of the firearms law:

> "As this Court emphasized only last term in *Rewis* v. *United States, supra,* we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

In *Bass* the Court recognized the states present statutes of control in the area of firearms. Also that the Tenth Amendment gives all powers to the state unless enumerated by the Constitution to the Federal government. While the Tenth Amendment is not a repository of state powers, it does tend to restrict the areas of conflict to entry only by congressional mandate rather than pure court interpretation.

A look at the legislative history behind Title 18 U.S.C. §922(a)(6) makes the point clearer. Congress indicated expressly which subsections of the act were to apply to intrastate transactions. For example above 18 U.S.C. §922(b) in the legislative history it states, "Contains prohibitions applicable only to licensees—the prohibitions go to intrastate as well as interstate transactions by licensees." No such provision for intrastate transactions is made above 18 U.S.C. §922(a), indicating that it should only be applied to interstate transactions (Appendix C.)

The conference committee's reports indicate that the matter of the Federal Government going into intrastate gun control had long been an emotional battle.

The final Senate Amendment specifically stated, "To provide for better control of the interstate traffic in firearms." 114 Cong. Rec. 30,568 (daily ed. Oct. 10, 1968).

In speaking to the Senate on this subject, Senator Hruska stated:

> "Mr. President, I might say further that the real issue which was properly and justifiably denied in this body as well as the other body was that of Federal registration or licensing of guns and gun owners. That issue this body met four-square. There were four attempts and four variations of that effort and each one of them was decisively turned down as it should have been.
>
> "In the House of Representatives, that concept was turned down by a ratio of almost two to one. I think that fairly and squarely reflects the sentiment of the American people. They are not ready for that type of Federal regulation and control. If anything is to be done in that direction, it should be done by the municipalities and the states which are capable of enforcement of that kind of law."

From these statements it is obvious that this law was not intended to cover or license firearms only in intrastate transactions. Throughout the other subsections of Section 922 it mentions interstate expressly where Congress meant interstate (Appendix C).

The statute is a criminal statute and must be strictly construed. In construing the penal statutes strictly one is not to be subjected to a criminal penalty unless the words of the statute plainly impose it. *U. S.* v. *Campos-Serrano,* 404 U. S. 293.

2.) The Court of Appeals in affirming the judgment clearly deprived the Defendant of his protection against illegal searches and seizures.

The exclusionary rule has long been established to prevent the introduction of evidence which was improperly obtained. The 'fruit of the poisonous tree' doctrine which arose from the landmark case of *Wong Sun* v. *United States,* 371 U. S. 471, would clearly exclude the evidence used against the Defendant in this case. Since the testimony of agent Johnston clearly arose from and was the result of an arrest which was later found to be illegal, the testimony given by said agent should have been excluded. It was clearly poisonous fruit and the arrest was found to be invalid by the Court for the Southern District of Indiana. Yet the indictment for the separate offense in Kentucky was entirely based upon the illegal Indiana arrest.

3.) By admitting the testimony of an Alcohol, Tobacco and Firearms agent to prove that the Dealer concerned in this instance was in possession of a proper license was a clear error by the Court. The Court of Appeals tries to equate the testimony of said agent with that of a keeper of the records. The two are not equal. Under the Fifth Amendment of the United States Constitution we are guaranteed a right to be confronted by our accusers and the evidence against us. This right was denied to the Defendant at his trial.

In *Shreve* v. *United States,* the Court of Appeals for the Ninth Circuit set forth specific requirements for the Best Evidence Rule.

> "The Best Evidence Rule means simply, that the best evidence in the power of a party to furnish

must be produced. Before substituted evidence may be used, it must be made to appear that the party is unable to produce primary evidence, either through loss, or otherwise. Secondary evidence of the contents of a writing may be introduced, ordinarily, upon a sufficient showing, to the satisfaction of the Court, of the existence of the original and the fact that is unavailable to the party" 103 F. 2d 796.

No showing was made at the trial that the document itself could not be produced. The defense objected to the admission of the secondary evidence which was so vague he had no actual right to cross-examine it. The elements of the crime itself require a purchase from a "licensed dealer."

The Court of Appeals felt that the Agent's testimony was similar to that of a custodian. Yet the Sixth Circuit, itself, has held that a custodian could only testify where a "Mass" of records was concerned. *Pen-Ken Gas and Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F. 2d 871, at 881. *Pen Ken* was a civil case. Surely the rule for a criminal case must be at least as much if not more stringent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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